

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

ENTERGY NUCLEAR VERMONT YANKEE, LLC
and ENTERGY NUCLEAR OPERATIONS, INC.,

Plaintiffs

V.

) Case No. 1:11-cv-99

PETER SHUMLIN, in his official capacity as GOVERNOR OF THE STATE OF VERMONT; WILLIAM SORRELL, in his official capacity as the ATTORNEY GENERAL OF THE STATE OF VERMONT; and JAMES VOLZ, JOHN BURKE, and DAVID COEN, in their official capacities as members of THE VERMONT PUBLIC SERVICE BOARD,

Defendants.

MEMORANDUM OF LAW OF *AMICUS CURIAE* IBEW LOCAL 300 IN SUPPORT OF
PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

The International Brotherhood of Electrical Workers, AFL-CIO, Local 300 (“Local 300”) hereby respectfully submits this brief as *amicus curiae* in this matter, in support of the Plaintiffs’ Motion for a Preliminary Injunction, which was filed with this Court on April 22, 2011. This memorandum of law accompanies and is filed with a Motion for Leave of Court to file Amicus Curiae Memorandum of Law. The grounds for the request for leave to file this memorandum are contained in that Motion. No person other than the *amicus curiae* contributed money that was intended to fund preparing or submitting the memorandum.

I. Introduction and Purpose of Memorandum

Local 300 is labor union affiliated with the International Brotherhood of Electrical Workers, AFL-CIO. (See Affidavit of Jeffrey Wimette (“Wimette Aff.”), attached, at ¶ 2) Local

300 represents over 1100 members who work for electrical utilities, construction contractors, municipalities and other employers in the state of Vermont. *Id.* at ¶ 3. Local 300 has one hundred seventy-four (174) members who are currently permanent employees at the Vermont Yankee power plant (“VY”). *Id.* In addition, numerous other Local 300 members periodically perform work at Vermont Yankee when the plant has temporary increased staffing needs. *Id.* at ¶ 4. For instance, in 2010, approximately thirty-five (35) Local 300 members performed full-time work for most of the year for an outside contractor, Williams Plant Services LLC, on a security upgrade at Vermont Yankee. *Id.* In addition, when Vermont Yankee performs a periodic “shutdown” for maintenance and/or refueling, approximately fifty (50) additional Local 300 members work there for several months at a time. *Id.* Finally, many of Local 300’s members and their families reside in the region in which Vermont Yankee is located and thus are directly affected by the plant’s positive impact on the local and regional economy. *Id.* at ¶ 5.

This memorandum is intended to address one very specific point which is before the Court and on which Local 300 has important information and particular expertise. One of the factors which the Court must address in ruling on the Plaintiffs’ motion is the effect of the proposed injunction (or the failure to grant same) on the public interest. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 129 S. Ct. 365, 376-77, 172 L. Ed. 2d 249 (2008). *See also* *Million Youth March, Inc. v. Safir*, 155 F.3d 124, 125 (2d Cir. 1998). The elimination of jobs is an effect on the public interest which Courts should consider when weighing a request for a preliminary injunction. *Am. Cyanamid Co. v. U.S. Surgical Corp.*, 833 F. Supp. 92, 133 (D. Conn. 1992) (finding that an injunction against manufacturing and sale of surgical sutures that would cause the layoff of many employees was not in the public interest). Local 300, as the representative of a significant percentage of Vermont Yankee’s employees, is in a unique

position to provide the Court with details about the effect of the failure to enjoin the closure of Vermont Yankee during the pendency of this litigation on the employees and the local economy.

II. The failure to grant the injunction is likely to lead to both the immediate and long-term loss of jobs at Vermont Yankee and to negatively impact the local economy.

On January 31, 2010, a study commissioned by Local 300, called “The Economic Impact of the VY Station” was released. (“the Heaps report,” Attached as Exhibit A). While the parties in this matter have made reference to and excerpted this report, Local 300 will provide additional background and context on this report, and highlight other key facts in the report that have not been raised by the parties.

A. Economic demographics of Windham County

The impact of the failure to grant a preliminary injunction on the public interest will be felt widely, both in Vermont as well as in the neighboring states of New Hampshire and Massachusetts, where many Vermont Yankee employees and Local 300 members reside. But the impact will be most acutely felt in Windham County, where Vermont Yankee is located. Thus, it is worth bearing in mind the demographics of Windham County, as well as some demographics of Vermont generally.

Windham County has a higher percentage of residents living below the Federal Poverty Line than the state as a whole (12.3% for Windham County, as opposed to 11.5% for Vermont overall)¹. Windham County had a median household income in 2009 that was less than the state's overall – \$51,129 vs. \$46,912.² The most recent statistics on unemployment show that Windham County has a higher rate of unemployment than the state as a whole. In April 2011,

¹ Data retrieved from <http://www.census.gov//did/www/saipe/county.html> (accessed May 24, 2011)

² *Id.*

Windham County had an unemployment rate of 6.3%, compared to a statewide rate of 5.3%,³ a rate that was 18.8% higher than the state.⁴ Windham County participation in Vermont's Food Stamps program (called "3SquaresVT") increased 7% between October 2009 and October 2010.⁵ One in 5 children in Windham County are considered "food insecure."⁶ 43% of grade school and high school students in Windham County are eligible for free or reduced-price meals.⁷

B. The impact of the wages and earnings of Vermont Yankee employees on the local economy

As the Plaintiffs pointed out in their memorandum in support of their motion, "the Vermont Yankee Station is one of the top 5 employers in Windham County." *Plaintiffs' Memorandum*, at p. 51. Vermont Business Magazine listed the VY station as the 2nd largest employer in Windham County and the 31st largest employer in the state in 2009. (Exh. A at p. 8 and 12). However, that figure used an inaccurately-low number of employees in making that ranking. The Heaps study found that "using the correct number (669), the VY Station is actually the 21st largest employer in Vermont." *Id.* Vermont Business Magazine also listed VY as third in its "2011 Best Places to Work in Vermont"⁸

³ From VERMONT COUNTY DATA 1/ Employment Adjusted to Persons by Place of Residence Not Seasonally Adjusted, <http://www.vtlni.info/couur.htm> (accessed May 24, 2011)

⁴ Vermont's unemployment rate may seem low. However, as the Vt. Commissioner of Labor recently explained, "Vermont's unemployment rate is declining for two principal reasons – one good, one not so good. Our job loss may be stabilizing, (that's the good thing), but we are still not creating new jobs in the state's economy. That may not occur for some time. The larger factor contributing to our improving unemployment rate is a decline in our labor force – the number of people working or actively seeking work. Vermont has very little population growth and one of the oldest working age populations in the country... Older workers are retiring faster than they can be replaced by younger people. In addition Vermont is now experiencing a net decline in migration – more people are leaving the state than are moving in. The result: stable employment and declining labor force means a decline in unemployment rate." Vermont's Labor Market News, December 2009, <http://www.vtlni.info/lmnews/lmnews.pdf> (accessed May 24, 2011)

⁵ "Hunger in Windham County," Hunger Free Vermont, 1/10/2011, <http://www.hungerfreevt.org/CountyHungerSheets/Windham.pdf> (accessed May 24, 2011)

⁶ *Id.*

⁷ *Id.*

⁸ <http://www.vermontbiz.com/news/march/best-places-work-vermont-rankings-revealed> (accessed May 27, 2011)

The Heaps study further found that the average earnings of Vermont Yankee Station employees in 2009 was just under \$104,000. (Exh. A at p.3). This is approximately 120% higher than the 2009 median income for Windham County (\$46,912) and approximately 103% higher than the 2009 median income for Vermont as a whole (\$51,129). The hourly wages of Local 300 members at VY range from \$21.14 to \$41.95. *Wimette Aff.* at ¶ 7. By contrast, the Vermont minimum wage is \$8.15 per hour⁹, which means that Local 300 members earn 2.6 - 5.1 times the minimum wage. Per the collective bargaining agreement between Local 300 and Entergy, all of these employees are scheduled to receive a 1.6% raise on August 20, 2011 and another 1.6% raise on February 20, 2012. *Id.* at ¶ 8.

It cannot be disputed that the loss of such high-paying jobs would have a significant and devastating impact on the local economy. This is true both for employees who are residents of Windham County, as well as those who reside elsewhere in Vermont or New Hampshire or Massachusetts. Vermont Yankee employees who reside in Windham County naturally spend a significant portion of their income within the county, and contribute to the local tax base. But the contributions of out-of-state employees to the local economy are significant as well. They make significant purchases at local businesses (e.g. restaurants, gas stations, other retail establishments), while placing little or no burden on local government services.

Key findings of the Heaps study include:

- "the total payroll created at all Windham County employers by the presence of the VY station equal[ed] \$84.2 million in 2009... In total, though the VY station led to a payroll increase throughout Vermont that totaled approximately \$93.3 million in 2009." (Exh. A, p. i)
- "In 2009, the disposable income of Windham County residents was \$64.5 million higher due to the presence of the VY station than it would be otherwise. Elsewhere in the state, disposable income was \$14.0 million higher due to the VY station. In total, disposable

⁹ <http://www.labor.vermont.gov/Portals/0/UI/Press%20Release%20Minimum%20Wage%20Increase%202011.pdf> (accessed May 27, 2011)

income of all Vermont residence was \$78.5 million higher in 2009, then otherwise due to the presence of the VY station.” *Id.*

- “It is clear that the operation of the VY station in Vernon had a large and positive economic impact on Vermont in 2009, creating 1288 jobs, a payroll of \$93.3 million, and raising disposable incomes by \$78.5 million.” *Id.*
- “[T]hrough the multiplier process, an additional 395 jobs were created in Windham County in 2009 due to the presence of the VT [sic] station in Vernon.” *Id.* at p.4.
- “Elsewhere in Vermont, an additional 224 jobs existed in 2009 [due] to the existence of the VY station.” *Id.* at p.5
- “Therefore, the total number of jobs created in the state of Vermont by those the why stations, 669 jobs equaled 1288. This implies an employment multiplier of 1.93. This relatively large multiplier is due to the high wages at the power station itself, which generates the large multiple impact. (Note: 173 additional jobs were created in Cheshire County, New Hampshire and Franklin County, Massachusetts, but are not counted in this figure.)” *Id.*
- “In summation, the VY station...account[s] for one out of every twenty jobs in the county. It is ultimately the source of one dollar out of every \$10 paid by employers in the County given the lack of job growth in the county and this stability of the employment and earnings at the VY station, it is hard to understate the importance of the VY station to the residents of Windham County.” *Id.* at p. 13.

C. The impact of a shutdown on the health care coverage of employees and healthcare spending generally.

Pursuant to its collective bargaining agreement with Local 300 (“the Agreement”), Vermont Yankee provides health insurance coverage to Local 300 members. There are several medical plan options with differing levels of coverage, with employees making a monthly contribution to the premium through a payroll deduction that ranges from \$0 to \$487 per month, depending on the plan selected and the size of the employee’s family. *Wimette Aff.* at ¶ 9. Three-hundred sixty-seven (367) Local 300 members and their dependents (children and spouses) receive health coverage from Vermont Yankee. *Id.* at ¶ 10. In addition, Vermont Yankee provides similar coverage to its other employees who are not Local 300 members.

Although VY employees who lose their coverage as a result of termination of employment become eligible for continuation coverage under COBRA, such coverage is very expensive. A family plan (coverage for the employee, a spouse and children) costs \$1,221 to \$1,703 per month, depending on the plan chosen. *Id.* at ¶ 11. This figure is far out of reach of most families who find themselves with one less source of income. Further, COBRA continuation coverage generally lasts only 18 months (or up to 29 months in the case of a disability).¹⁰ Thus, closure of the plant will result in immediate termination of the health coverage of hundreds of employees and their dependents, most of whom will not be able to afford COBRA continuation coverage, especially given that they will have lost a primary, if not sole, source of their income.

Some members who lose their health care coverage as the result of a (temporary or permanent) closure of the plant will become eligible for coverage under various state and federal public health care programs (e.g. Medicaid, Dr. Dynasaur, Vermont Health Access Plan, etc.). These programs entail significant expenditure of public funds, and have been facing increased enrollment during the most recent recession and economic downturn. The percentage of Vermont residents receiving health care coverage from a state program increased more than 18% from 2000 to 2009.¹¹ These programs already represent a significant percentage of state spending. Vermont spends \$5,394 per Medicaid enrollee, and 15.7% of the state's General Fund goes just to Medicaid.¹² This figure does not include state spending on other health coverage programs. Vermont Medicaid paid for 25% of all state health care costs in 2009.¹³

¹⁰ 29 U.S.C. § 1162(2)(a)(i)

¹¹ From 18.5% in 2000 to 21.9% in 2009. "2009 Vermont Household Health Insurance Survey," Vermont Department of Banking, Insurance Securities and Health Care Administration <http://www.bishca.state.vt.us/sites/default/files/VHHIS-Presentation-Legislature-2009.pdf> (accessed May 24, 2011)

¹² <http://www.statehealthfacts.org/mfs.jsp?rgn=47&rgn=1> (accessed May 24, 2011)

¹³ <http://www.bishca.state.vt.us/sites/default/files/2009%20EA%20REPORT.pdf> (accessed May 24, 2011)

Further, a closure of the plant will negatively affect the health coverage of other Local 300 members as well. Many Local 300 members work for electrical contractors who are members of an association called the Electrical Contractors of Vermont (“the Association”). *Wimette Aff.* at ¶12. Pursuant to a collective bargaining agreement between the Association and Local 300, such members receive health care coverage from the New England Electrical Workers Benefits Fund (“the Fund”). *Id.* The Fund is an ERISA-governed employee benefit plan that pays for medical care for its covered participants (members of IBEW Locals, including Local 300, and their dependents). *Id.* Many of the contractors that are members of the Association do not have stand-alone health plans for their unionized employees. Rather, pursuant to their collective bargaining agreement with Local 300, they make contributions to the Fund for every hour that a Local 300 member works for them. *Id.* at ¶ 13. Those contributions are part of a pool of funds that are used to pay for health care for all the participants in the Fund. *Id.*

VY at times contracts with outside contractors to perform work at the plant. For example, as described earlier, VY hired Williams Plant Services LLC to perform security upgrades in 2010. *Id.* at ¶ 4. Approximately 35 members of Local 300 spent approximately a year working on-site at VT to complete this work. *Id.* In 2010, the collective bargaining agreement to which that contractor was signatory required an hourly contribution to the Fund of \$7.20. *Id.* at ¶ 13. A very conservative estimate (in that it does not include overtime hours, which are very common) of that contractor’s monthly contribution to the Fund would be \$43,344.00 (35 employees x 40 hours/week x 4.3 weeks/month x \$7.20/hour). A closure of the plant means that contributions by outside contractors for work performed at VY would cease and that the hours worked by Local 300 members on such work would drop to zero. When Local

300 members who receive health coverage from the Fund have their number of hours drop below a certain level, they lose that health coverage. *Id.* at ¶ 14.

In sum, a loss of jobs at Vermont Yankee will have a significant impact on the health coverage of the VY employees who lose their jobs, on their families, on Local 300 members who work for contractors at the plant, and on state health care programs and the state treasury, all of which are matters of significant concern to the public interest.

D. Re-employment options for laid-off Vermont Yankee employees will be limited

Most of the Local 300 members who would lose their jobs in the event of a VY closure are employees with highly specific and technical skills that are not necessarily transferable to other employers. *Id.* at ¶ 15. Exhibit B, attached herein, lists the titles of Local 300 members at VY. Many of the positions involve highly specialized training in nuclear power plant operations and safety, and the handling and monitoring of radioactive materials (such as Radiation Protection Technicians [“RP Tech”], and Decontamination Technician [“Decon Tech”]). *Id.* As the Plaintiffs pointed out in their Memorandum, Operators at the plant must have either an Operator License or a Senior Operator License issued by the Nuclear Regulatory Commission. *Plaintiffs’ Memorandum*, p. 36. “[T]hese licenses are Vermont Yankee station – specific. In other words, the operator license for another nuclear generating facility does not qualify the license holder to operate Vermont Yankee station.” *Id.* Further, “the Operator – License training and application process is lengthy,” requiring “successful completion of a 24-month training program.” *Id.* As Exhibit B demonstrates, Operators are among the highest paid members of Local 300 at VY.

The employment prospects of Vermont Yankee employees are constrained by the highly specific nature of their training, duties and skills and the limited number of nuclear facilities.

Even those employees whose general skills would enable them to find employment elsewhere would likely face diminished earnings as the wage they could earn at a non-nuclear facility would not compensate them for the valuable nuclear-related skills and training they possess. For instance, a technician who is trained in the handling and monitoring of highly-radioactive nuclear materials would inevitably earn less at a non-nuclear electric utility where that training is not needed.

The Defendants in their memorandum attempt to minimize the impact of the loss of these positions, saying, "While current jobs at the plant will be lost upon shutdown, the net effect on employment in the region over time is unclear." *Defendants' Memorandum*, p.54. They claim the jobs lost upon a Vermont Yankee closure will be replaced by jobs created by new power resources to replace Vermont Yankee. They point in particular to the "Green Scenario" in the Consensus Study. However, there are several flaws in this analysis.

First, the harm to the public interest is not solely the net loss of jobs in the region. Just as important, if not more important, is the loss of jobs to the Vermont Yankee employees and their medium-term and long-term economic prospects. Even if new companies and power-generating facilities are created in Vermont to replace Vermont Yankee's capacity, there is absolutely no guarantee that jobs created at such facilities will go to former Vermont Yankee employees. Depending on the type of technology and equipment involved, it is as likely as not that the skills required of workers in such facilities will be different than the skills possessed by Vermont Yankee employees. Further, there is no guarantee that, even if former Vermont Yankee employees did receive such jobs, but they would receive equivalent pay and therefore make an equivalent contribution to the local and regional economy.

In addition, while the Consensus Study concluded that the Green Scenario would provide comparable employment levels to the relicensing of Vermont Yankee, that scenario was and remains completely speculative. It will be small comfort to the hundreds of laid-off Vermont Yankee employees, their families, and the local businesses who depend upon them that at some unspecified time in the future, there may be new companies that may or may not be located in the same region, and that may or may not employ those former Vermont Yankee employees, at wages that may or may not be equivalent.

The re-employment prospects of Local 300 members are further affected by their age demographics. Of the 174 Local 300 members who are VY employees, at least sixty-four (64) of them are over the age of 50. *Wimette Aff.* at ¶ 16. There are numerous obstacles to older workers gaining new employment, including conscious and unconscious age discrimination, eligibility for a narrower range of jobs due to having a specialized skill set or physical limitations that younger workers may not have and limitations on the ability to train for new jobs (a younger worker with more years left in the workforce may be more willing to undertake a lengthy course of study or training program, or relocate out of state, than an older worker nearing retirement).

E. The harms that VY employees will suffer in the event of a plant shutdown are not speculative and are likely to be permanent.

Notwithstanding Defendants' statements to the contrary, there is no guarantee that a decision on the merits in this matter will issue prior to March 21, 2012. Litigation timelines are unpredictable and subject to change. If a decision does not issue prior to March 21, 2012, the plant is likely to shut down, causing the harms to the public interest described in this brief. Thus, the injunction is necessary in order to prevent these clear harms prior to a decision on the merits.

The Plaintiffs in their Memorandum highlight the risk that a shutdown on or after March 21, 2012 would be permanent. The Defendants, unsurprisingly, dispute that assertion. Local 300

recognizes that this technical question is outside the scope of this amicus brief and defers to Plaintiffs' evidence and arguments that a temporary shutdown is irreversible and in effect is a permanent shutdown. Thus, in its consideration of the effect of an injunction (or lack thereof) on the public interest, the Court should view any shutdown as permanent. If such a shutdown, prior to a final decision on the merits, in fact turns out to be permanent, it will be a *fait accompli* and render whatever decision the Court renders moot and superfluous. For instance, many VY employees, anticipating possible closure of the plant, are already exploring other employment. *Wimette Aff.* at ¶ 18. There is a distinct likelihood that some of them will be offered and will accept other jobs in the interim, possibly at lower wages and/or out of state, thus giving up well-paying jobs that contribute to the regional economy.

Finally, even if a shutdown was *not* permanent, many of the harms described in this memorandum would still occur. The longer the shutdown, the more significant the harm. The impacts on the employees and their financial well-being, on the local and regional economy and on the state treasury would all occur; the only question would be their severity, which would depend in large part on the duration of the shutdown.

III. Conclusion

In sum, Local 300 wishes to call to the Court's attention the serious and significant negative effects that a shutdown of the VY plant prior to a decision on the merits will have on its members, on the other employees of VY, on the local and regional economy and on the state of Vermont. A shutdown will lead to hundreds of VY employees losing well-paid jobs (jobs that create incomes significantly higher than the average incomes for the county and the state) and losing their health care coverage. The loss of these jobs will have a ripple effect on business in

the region, as the spending power of the former VY employees is greatly reduced. It will also increase the burden on state programs that are already facing very high demand.

An injunction preventing a shutdown until a decision on the merits will prevent these harms. If a final decision is issued in this matter prior to March 21, 2012, an injunction will cause no harm nor prejudice the Defendants. If, however, a final decision does not issue prior to March 12, 2012, the impacts described in this memorandum, many of them irreversible, will occur, causing significant harm to the public interest. Consequently, Local 300 respectfully urges the Court to grant the requested injunction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF), and paper copies will be sent to those indicated as non-registered participants on this day, the 31st day of May, 2011.